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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. NATHAN CHRISTIAN WOODRUFF, Defendant and Appellant.	G041608 (Super. Ct. No. 08CF1744) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed.

William D. Farber and Howard C. Cohen, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Daniel Rogers and Jennifer A. Jadovitz, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Nathan Christian Woodruff of second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c))[1] and second degree burglary (§§ 459, 460, subd. (b)). The court sentenced defendant to the low term of two years in state prison for the robbery and stayed sentence on the burglary.

FACTS

Around 11:30 a.m. on June 10, 2008, at a Home Depot in Orange, Ronald Avila, an employee who specialized in asset protection, was alerted by another employee that a customer was acting suspiciously. (At trial, Avila identified defendant as the customer.) Avila followed defendant down store aisles and saw him place a container of coax connectors into his left rear pants pocket. Defendant then took two packages of binding posts and put them into his front pants pockets as he walked down various aisles. He picked up a faucet box, but ultimately returned it "to another area of the store."

Defendant left the store without paying for the items in his pockets. Avila followed defendant. Pursuant to company policy, Phillip Mendez, a Home Depot lot attendant, positioned himself "in the front pad in front of the doors" to serve as Avila's witness. Mendez watched the entire incident.

Avila "came from behind" defendant to stand in front of him. Avila identified himself "as Home Depot asset protection" and displayed his identification card. Avila asked defendant to return to the store to discuss the items he'd taken without making payment.

Defendant "said he didn't have anything." Avila again asked him to "go back inside and talk about it." Defendant "sidestepped . . . and tried to run past" Avila.

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[1] All statutory references are to the Penal Code.

Avila "grabbed . . . his torso to stop him." Defendant tried to pull away from Avila, as Avila "maintain[ed his] grip on him."

They "fell into one of the Home Depot rental trucks that was parked nearby." Defendant "was still trying to run away." They "went to the ground, and [Avila] was wrestling to keep him on the ground."

Avila pinned defendant "down on the ground," and told him "to stay down" and to stop resisting. Defendant "kept trying to get up." Defendant "said he didn't have anything," "then tried telling [Avila] that he came in with it," without identifying what "it" was. Defendant said, "Just let me go." At one point, defendant said, "When I get up, we are going to box." Avila understood defendant "to mean if [defendant] stood up, he was going to assault" Avila. Avila felt his safety was endangered. Defendant also said, "I used to work loss prevention. You don't have anything. I'm going to sue you."

At one point, defendant assaulted Avila. Avila was holding defendant on the ground with defendant "in a seated position." Avila was "behind him and slightly standing up, using [Avila's] body weight to keep him down." Suddenly defendant thrust his head back and hit Avila's mouth, causing a cut to Avila's lip that bled and "swelled up a little bit." Two more times defendant thrust back his head, but missed Avila who had moved away slightly. Witness Mendez observed defendant give "numerous . . . head butts."

Avila asked Mendez and another employee to phone the police. The store operations manager arrived to help Avila restrain defendant and to ensure the situation "was calming down." About 11 minutes elapsed from the time Avila first contacted defendant until the police arrived. Two Home Depot security cameras took video footage of the incident.

A police officer arrived and handcuffed defendant. The officer removed the binding posts from defendant's pockets and "tossed them on the ground." Avila

picked them up from the ground and also retrieved the coax connectors from defendant's pocket. The items were worth approximately $90.

The officer observed a cut and blood on Avila's lip. Avila told the officer that "while he was attempting to detain the subject after the theft, they were wrestling on the ground, and [defendant] thrust his head backwards and hit him in the lip." Defendant told the officer he might "have head butted [Avila], but it was an accident." Defendant also told the officer "he had purchased the property a week prior in a different store, and he was at that store to return it."

Prior Uncharged Incident

On August 12, 2007, Juan Gonzalez, the asset protection specialist at the Tustin Home Depot, saw defendant leave the store without paying for merchandise. Gonzalez "approached [defendant] outside of the store and identified [himself] as . . . loss prevention." Defendant stated he would return the merchandise but would not go in the store because Gonzalez would call the police. Nonetheless, defendant "came back into the store with" Gonzalez and emptied out the bag and the stolen "merchandise onto a register counter."

Defense

Defendant testified he went to the Home Depot to pick up supplies for a job on which he was working. He put the speaker binding posts in his pocket after realizing that, although he had some cash and a gift certificate, he did not have enough money for both the posts *and* a faucet. He intended to steal the items in his pockets, but not the faucet because it would not fit in his pocket. He went outside the store to get a shopping cart for the faucet because he planned to purchase it.

According to defendant, Avila did not identify himself until they "hit the truck and were almost on the ground." Nor did defendant ever grab Avila, throw a punch

at him, or try to run from him or use (or threaten) force against him. Defendant stated Avila is "a big guy" and twice defendant's size. Defendant told Avila: "Let go, I will cooperate. I have no problem in standing here. We can call the cops. I don't have a problem with this in the world." Defendant told Avila to let go of his arm because "it was hurting." Defendant threw his head back because Avila "was jamming [defendant's] sunglasses into [defendant's] eyes." Defendant probably did make the comment about boxing because he "was pretty upset and felt like [Avila] was manhandling [him] quite a bit."

Defendant had been convicted in North Carolina of possession of marijuana and obtaining property by false pretenses. He had been "addicted to drugs and alcohol for a long time," but had been clean "for about four or five years."

As to the prior (2007) Home Depot incident, defendant went into the store to purchase some items for a job and realized he did not have enough money. Theft was "a bad habit [he hadn't] gotten rid of yet."

DISCUSSION

Substantial Evidence Supports Defendant's Robbery Conviction

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) Defendant argues he "never 'accomplished' a taking by the use [of] force or fear," pointing out he never "successfully carried away the property" and never succeeded in escaping from Avila. Although he acknowledges he struggled with Avila, he claims his "use of force did not result in the retention of store property or in asportation." He concludes, "The evidence at most . . . supported the lesser offense of attempted robbery."

On appeal we consider "whether there is substantial evidence to support the conclusion of the trier of fact," "not whether guilt is established beyond a reasonable doubt." (*People v. Redmond* (1969) 71 Cal. 2d 745, 755.) We review the whole record "'in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) To be substantial, evidence must be "reasonable, credible, and of solid value." (*Id.* at p. 578.) "Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error." (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.)

We review the law on robbery. A robbery continues until "'the loot [has been] carried away to a place of temporary safety.'" (*People v. Gomez* (2008) 43 Cal.4th 249, 256.) This "carrying away" phase — or asportation — continues when a robber struggles with a victim to prevent the victim from recovering stolen goods. (*People v. Pham* (1993) 15 Cal.App.4th 61, 65 (*Pham*).) "'[C]arrying away' includes . . . deterring a victim from . . . attempting to immediately reclaim the property." (*People v. Flynn* (2000) 77 Cal.App.4th 766, 771 (*Flynn*).)

"In order to support a robbery conviction, the taking, either the gaining possession *or* the carrying away, must be accomplished by force or fear." (*Pham, supra,* 15 Cal.App.4th at p. 65, italics added.) "The use of force or fear to . . . retain even temporary possession of the property constitutes robbery." (*Flynn, supra,* 77 Cal.App.4th at p. 772.) For example, a defendant's use of force against a store security guard "to resist [the guard's] attempts to retake the stolen property . . . was applied . . . in furtherance of the robbery and [could] properly be used to sustain the conviction." (*People v. Estes* (1983) 147 Cal.App.3d 23, 28.)

"[R]obbery does not require that the loot be carried away *after* the use of force or fear." (*Pham, supra,* 15 Cal.App.4th at p. 65.) In other words, robbery does not

require "that defendant escape with the loot." (*Id.* at p. 67.) The law on this issue is well established: "'No authority supports [the defendant's] contention that liability for the "completed" offense of robbery (as opposed to a mere attempt) does not *commence* until the robber has escaped with the loot to a place of temporary safety. Rather, the law is well settled to the contrary. No extended asportation is required for the offense to pass from the attempt stage to the consummated offense.'" (*Id.* at p. 66.)

Here, the jury was instructed on robbery, including the element that "the defendant used force or fear to take the property" (CALCRIM No. 1600), as well as on the lesser included offense of attempted robbery. The jury found defendant guilty of robbery.

Substantial evidence supports the jury's implied finding that defendant used force or fear to prevent Avila from recovering the stolen property. When Avila asked defendant to return to the store to discuss the stolen objects, defendant denied taking anything and then tried to evade Avila. Defendant struggled with Avila, threatened him, and "head butted" him, and thereby successfully kept possession of the stolen goods, albeit temporarily. The stolen items remained in defendant's pockets, and the taking continued, until the police officer arrived. Defendant accomplished the taking through the use of force or fear.

The Court Properly Instructed the Jury on Robbery

Defendant contends the court erred by failing sua sponte to instruct the jury, in accordance with the language of section 211, that robbery involves a taking "accomplished by means of force or fear." The court instructed the jury with CALCRIM No. 1600 on robbery, which requires the People to prove that "the defendant used force or fear to take the property or to prevent the person from resisting." Defendant points out that former CALJIC No. 9.40 on robbery tracked the statutory language more closely and

required the taking or carrying away to be "accomplished either by force or fear to gain possession or to maintain possession."

Thus, defendant focuses on the absence of the word "accomplished" in CALCRIM No. 1600. He argues "'accomplished'" means "completed or done successfully." He concludes the jury was not instructed that "a robbery must be 'completed' or 'done successfully' or 'attained' by the use of force or fear."

A "criminal defendant is entitled to adequate instructions on the defense theory of the case" if supported by the law and evidence (*Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739) and "'has a constitutional right to have the jury determine every material issue presented by the evidence . . . .'" (*People v. Lewis* (2001) 25 Cal.4th 610, 645). A trial court bears a sua sponte duty to instruct the jury on the essential elements of an offense. (*People v. Flood* (1998) 18 Cal.4th 470, 504.)

But a court has no sua sponte duty to give amplifying or explanatory instructions. (*People v. Anderson* (1966) 64 Cal.2d 633, 639.) Rather, a party must request such an instruction; failure to do so waives the claim. (*Ibid.*) A "party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503.)

Here, in essence, defendant claims CALCRIM No. 1600's requirement that a defendant use force or fear "to take" property is incomplete. He contends the instruction needs clarification of the phrase "to take," i.e. an amplifying instruction that a defendant must "accomplish" or "successfully complete" a taking in order "to take" the property. Defendant's failure to request that amplifying instruction below waived his claim.[2] (*People v. Arias* (1996) 13 Cal.4th 92, 171.)

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[2] Defendant argues under *People v. Salcido* (2008) 44 Cal.4th 93, that his "instructional claim may be raised initially on appeal to the extent it implicates his substantial rights." (*Id.* at p. 155.) He contends the instruction reduced the prosecutor's

In any case, the court did instruct the jury as to what was required for a taking to be effectuated. CALCRIM No. 1600, as read to the jury, defined taking as follows: "A person takes something when he or she gains possession of it and moves it some distance. The distance moved may be short. . . . . A person does not have to actually hold or touch something to possess it." The court also instructed the jury with the prosecutor's special instruction No. 1 as follows: "The taking element of theft begins when the property is moved slightly and continues while it is being carried away by the perpetrator. [¶] A mere theft may become a robbery if a perpetrator uses force or fear in order to escape with the loot, even if it was intentionally taken in a peaceful manner."

There was no instructional error here.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

SILLS, P. J.

ARONSON, J.

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burden of proof. But as explained above, defendant's challenge to CALCRIM No. 1600 involves an incognizable complaint raised on appeal that the court failed "to expand, modify, and refine standardized jury instructions." (*People v. Daya* (1994) 29 Cal.App.4th 697, 714.)